Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1129

FRANK J. BRASCO,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Preliminary Statement

Respondent's brief is submitted in opposition to the petition for a writ of certiorari to review the order of the New York Court of Appeals, entered October 19, 1978, denying petitioner's motion for leave to appeal to that Court from an order of the Appellate Division of the

Supreme Court of the State of New York, Second Judicial Department, entered April 3, 1978, which struck petitioner's name from the roll of attorneys of the State of New York. (*Matter of Frank J. Brasco,* 62 A.D.2d 1006, 45 N.Y.2d 711). An application for leave to appeal to the Court of Appeals of New York had been denied on June 9, 1978 by the Appellate Division, Second Judicial Department.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C. 2101.

Statement of the Case

Petitioner Frank J. Brasco was admitted to the practice of law in the State of New York on March 26, 1958, by the Appellate Division of the Supreme Court, Second Judicial Department. While serving in the United States Congress as Representative from the 11th Congressional District of Brooklyn, petitioner was indicted for having allegedly engaged in a conspiracy, while a Congressman, to fraudulently obtain truck leases from the United States Post Office Department during the period from June 1967 to November 1968.

On July 19, 1974, after a jury trial held in the United States District Court for the Eastern District of New York, respondent was adjudged guilty of a one-count indictment which had alleged that he

> ". . . unlawfully, wilfully and knowingly did conspire, confederate and agree with others to obtain and retain from the Post Office Department truck leases and monies payable, by unlawful and fraudulent means, to wit, by defrauding the United States in violation of Title 18, U.S. Code, Sec. 371 and by committing violations of Title 18, U.S.C., Secs. 201, 203 and 1341 (Title 18, U.S. Code Sec. 371)."

On October 21, 1974, a judgment of conviction was entered and Frank J. Brasco was sentenced to

> ". . . imprisonment for a period of Five (5) years, pursuant to Title 18, U.S. Code, Sec. 3651, Defendant to serve three (3) months in a jail type institution. Execution of the remainder of the sentence is suspended. Defendant is placed on probation for a period of fifty-seven (57) months, subject to the standing Probation Order of this Court, and fined $10,000.00, fine to be paid or Defendant is to stand committed until fine is paid or he is otherwise discharged according to law, as well as the costs of the prosecution pursuant to Title 28, U.S. Code, Sec. 1918(b)."

On May 21, 1975, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction, and thereafter on October 6, 1975 the United States Supreme Court denied petitioner's petition for a writ of certiorari with respect to his criminal conviction (*United States* v. *Brasco,* 516 F2d 816, cert. den. 423 U.S. 860).

Neither the Automatic Disbarment Statute (Judiciary Law, Section 90, Subdivision 4), nor New York's interpretation thereof (*Matter of Chu*) 42 N.Y.2d 490, infringes upon any constitutionally protected right.

1. Retrospective Application of the New York Court of Appeals' Decision In *Matter of Chu* (Supra) Does not Constitute an *Ex Post Facto* Law and Bill of Attainder.

Based upon his conviction of a federal felony crime, petitioner's name was struck from the roll of attorneys and counsellors-at-law of the State of New York, by order of the Appellate Division, Second Judicial Department on April 3, 1978, pursuant to New York Judiciary Law Section 90, subdivision 4, which provides:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'" (supra at 292).

On October 13, 1977, the New York Court of Appeals modified the *Donegan* ruling in *Matter of Chu,* stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan* was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493)."

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* 45 N.Y.2d 866, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Petitioner's contention, that the application of the *Chu* ruling to him constitutes an *ex post facto* law and bill of attainder, is wholly without merit.

An *ex post facto* law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to *ex post facto* laws has long been held by this Court to apply solely to criminal statutes (*Baltimore & S.R. Co.* v. *Nesbit,* 51 U.S. 395, see also, *Mahler* v. *Eby,* 264 U.S. 32) and for this reason, petitioner's reliance on *Bouie* v. *City of Columbia* (378 U.S. 347) is unfounded.[1] The Supreme Court's decision in the *Bouie* case was based upon a determination that "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect" (supra at 354). The case at bar is neither a criminal one nor was the decision in *Chu* either "unexpected" or "indefensible." Judiciary Law, Section 90, has not changed, only the interpretation thereof vis à vis *Matter of Donegan* (supra) has changed, and for this reason petitioner's reliance on *Matter of Garland* (71 U.S. 33) is unfounded.

Petitioner's argument that the *Chu* ruling should not be applied retroactively in petitioner's case further ignores

[1] Disciplinary proceedings have consistently been held to be civil in nature (*Matter of Zuckerman,* 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968], and are not considered to be criminal (*Matter of Unger,* 27 AD2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

the fact that it has long been the law that new or revised principles of decisional law apply to all cases not finally adjudicated and in which litigation is pending (*People* v. *Morales,* 37 NY2d 262). In the *Morales* case, the New York Court of Appeals, relying upon authority of this Court, discussed the common-law concept of retroactivity as follows:

> "The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated. (Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 58.) Consequently, since the 'correct' law was looked upon as having always been the same, a case decided on direct appeal always received the benefit, or detriment, of any decisional law 'pronounced' before its judgment became final. (See *United States* v. *Schooner Peggy,* 1 Cranch [5 U.S.] 103, 110.) However, once a judgment had become final, it was not affected by law freshly 'pronounced' thereafter. (1 Blackstone's Commentaries 69 [15th ed.]; 1 Black, Judgments [2d ed.], §§245, 246.)" (Supra at p. 268.)

Similarly, rulings of this Court in *Mullany* v. *Wilbur,* 421 U.S. 684 (see *People* v. *Davis,* 49 AD2d 437) and *Morrissey* v. *Brewer,* 408 U.S. 471 (see *People Ex Rel Gambino* v. *Warden,* 43 AD2d 400) have been applied retroactively.

Indeed the law with respect to retroactivity is as stated by this Court in *Linkletter* v. *Walker,* 381 U.S. 618, that, "Under our cases it appears (1) that a change in law will

be given effect while a case is on direct review, *Schooner Peggy,* supra . . ." and ". . . no distinction (is) drawn between civil and criminal litigation . . ." (supra at 627).

In attempting to construe Judiciary Law §90(4) as a bill of attainder, petitioner ignores the prerequisites contained in the definition cited: "A legislative act which inflicts punishment *without judicial trial", Cummings* v. *The State of Missouri,* 71 U.S. (4 Wall.) 277 (1867). Judiciary Law §90(4) requires that an attorney be stricken from the rolls after the attorney has been convicted of a felony *at a judicial trial.* The *Cummings* decision involved a legislative act which required persons to take an oath of Loyalty as a prerequisite to practicing a profession. The "punishment", the exclusion from the practice of a profession was predicated upon the mere failure of the applicant to take the prescribed oath with judicial intervention totally absent in the process of the execution of the statute. Surely, this is not the case, whereas a prerequisite to the operation of Judiciary Law §90(4), an attorney is first tried in a Court of law with all of the attendant constitutional protections afforded a criminal defendant, and is then adjudged, beyond a reasonable doubt, to have been guilty of a felony crime.

The Courts of New York have specifically disposed of petitioner's "Separation of Powers" argument, noting that the statute (§90) is merely "declaratory of a jurisdiction [power of the courts to regulate attorneys] that would have been implied" (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 477; *Gair* v. *Peck,* 6 N.Y.2d 97, 110, cert den 361 U.S. 374).

2. Judiciary Law §90(4) Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner seeks to review, in a civil disciplinary hearing, his conviction of federal felony crimes which has already been affirmed after appellate review and which the United States Supreme Court itself declined to consider upon his previous petition for certiorari.

The State of New York has a compelling interest in regulating the practice of professions within its boundaries and is given wide latitude in determining what standards are appropriate for such regulation (*Goldfarb* v. *Virginia St. Bar,* 421 U.S. 773, 792 [1975]).

The interest of any state in the regulation of the practice of law is particularly important. The quality of the practice of law has a vital effect upon the public welfare. The requirement of high standards for attorneys is necessary not only to assure the orderly and efficient administration of justice but also to assure the public of proper counseling and representation. There are few areas of activity which do not have serious legal implications and the authority and responsibility conferred upon attorneys is extraordinary (*Ibid.; Schware* v. *Bd. of Bar Examiners,* 353 U.S. 232, 247 [1957] [Frankfurter, J., concurring]).

Respondent recognizes that the power of a state to regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Konigsberg* v. *Bd. of Examiners,* 353 U.S. 252, 273 [1957]). Respondent also recognizes that it may not be exercised in a way which infringes upon constitutional rights (*Bates* v. *St. Bar of*

Arizona, 433 U.S. 350, 97 S. Ct. 2691 [1977]; *United Transportation Un.* v. *St. Bar of Michigan,* 401 U.S. 576 [1971]). So long as the state does not exercise its power in such a manner, however, it has autonomous control over the practice of law (*Theard* v. *United States,* 354 U.S. 278, 281 [1957]).

Neither the automatic disbarment statute (Judiciary Law, Section 90, subdivision 4), nor the interpretation thereof by the New York Court of Appeals (*Matter of Chu, infra*), infringes upon any constitutionally protected right. The "right" to practice law may well be an important property or liberty interest within the meaning of the due process clause. It is not a right, however, which has specific constitutional protection. A state may properly adopt a law which adversely affects important property or liberty interests (*San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 31 [1937]). The Constitution merely requires that the legislation be addressed to a legitimate end and that the means taken are reasonable and appropriate to that end. This Court has defined specific Fourteenth Amendment guidelines as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426; (see also: *Rankin* v. *Shankar,* 23 N.Y.2d 111, 119).

The legislature of New York State has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh,* 25 A.D. 2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely, to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell,* 40 N.Y.2d 153, quoting Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 471 [Cardozo, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice Bradley, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and

> office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall,* 107 U.S. 265, 274.)" (*supra* at 156)

Moreover, the constitutionality of Judiciary Law, Section 90, in general and subdivision 4 thereof, in particular has been repeatedly upheld (*Mildner* v. *Gulotta,* 405 F. Supp 182, affd 425 U.S. 901; *Gerzof* v. *Gulotta,* 57 A.D.2d 821, mot for lv to app den, 42 N.Y.2d 960; *Matter of Abrams,* 38 A.D.2d 334; *Matter of Glucksman,* 57 A.D.2d 205; see also: *Matter of Mitchell, supra*).

In *Gerzof,* the Court specifically stated:

> "Moreover, it should be emphasized that the United States Supreme Court has found that section 90 does not violate the Federal Constitution . . ." (*supra* at 822).

To the same effect, the Court in Abrams specifically upheld the constitutionality of the automatic disbarment provision:

> "Although subdivision 4 of section 90 provides for automatic disbarment upon conviction (*Matter of Barash,* 20 N.Y.2d 154 [1967]) respondent's constitutional guarantee of due process is safeguarded by his jury trial and appellate review" (*supra* at 336).

This Court has denied each and every petition for certiorari thus far presented based upon the same claims of constitutional infirmities, by attorneys who were stricken from the roll of Attorneys pursuant to Judiciary Law, § 90, subdivision 4, based upon their conviction of federal

felonies. *Peltz* v. *Joint Bar Association Grievance Committee,* 60 AD 2d 587, mot. lv. to app. den. 43 N.Y. 2d 646, cert. den. May 3, 1978, 436 U.S. 926; *Davis* v. *Joint Bar Association Grievance Committee,* 60 AD 2d 613, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. October 2, 1978, —— U.S. ——; *Rosenberg* v. *Joint Bar Association Grievance Committee,* 62 AD 2d 1065, mot. lv. to app. den. 44 N.Y. 2d 648, cert. den. October 30, 1978 —— U.S. ——; *Cahn* v. *Joint Bar Association Grievance Committee,* 59 AD 2d 179, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. January 8, 1979, —— U.S. ——; *Fayer* v. *Joint Bar Association Grievance Committee,* 63 AD 2d 709, mot. lv. to app. den. 45 N.Y. 2d 708, cert. den. January 8, 1979, —— U.S. ——.

Petitioner's reliance on *Matter of Ming,* 469 F.2d 1352 (7th Cir. 1972) and *Matter of Jones,* 506 F.2d 527 (8th Cir. 1974) in support of his due process objection is unfounded. In *Ming,* the Seventh Circuit failed to apply a *court rule* requiring a summary suspension, where the attorney had been found guilty of a Federal misdemeanor. Section 90(4) is clearly applicable only to felony convictions. The District Court, in *Ming,* specifically noted the existence of a Court rule requiring summary discipline on the basis of a felony conviction and noted no constitutional infirmity with respect to such rule.

The Eighth Circuit's holding in *Jones* that a *Court Rule* providing for summary disbarment upon a felony conviction was violative of due process is inconsistent with this Court's denials of petitions for certiorari presented by attorneys who were stricken from the Roll of attorneys pursuant to Judiciary Law §90(4).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
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